STATE OF MICHIGAN

COURT OF APPEALS

ANGELO MAURICE HARRIS, Personal Representative of the Estate of ANDREA HARRIS, Deceased,

Plaintiff-Appellant,

v

ANITA WEAVER,

Defendant-Appellee.

UNPUBLISHED
August 17, 2006

No. 265617
Wayne Circuit Court
LC No. 04-403563-NI

ANGELO MAURICE HARRIS, Personal Representative of the Estate of ANDREA HARRIS, Deceased,

Plaintiff-Appellant,

v

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION (SMART),

Defendant-Appellee.

No. 265618
Wayne Circuit Court
LC No. 03-337242-NI

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Plaintiff appeals as of right the circuit court's grant of summary disposition to both defendants under MCR 2.116(C)(10) and MCL 500.3135(b)(2) in these consolidated wrongful death cases. We affirm.

On July 11, 2003, between 5:30 and 5:40 am, plaintiff's decedent Andrea Harris (age 41) was driving a 2002 dark green Avalanche eastbound on East Jefferson Avenue, near Parkview

Street in Detroit. Defendant Weaver, a bus driver for defendant SMART,[1] was driving a 2001 SMART bus westbound on East Jefferson in the same area, in the center lane of the three westbound lanes. At this location, Jefferson Avenue has three lanes in each direction, and a center turn lane. The posted speed limit is 35 m.p.h. There were two passengers on Weaver's bus, Wendy Patterson and Selena Logan. Weaver testified that it was not light out yet, that the roads were wet, that it was misting, and that she was driving about 25 m.p.h.[2] She could not remember if she had the windshield wipers on. Weaver testified that nothing was obstructing her view of the roadway.

Wendy Patterson testified she believed the bus was traveling at 30 to 35 m.p.h., but testified that the driver was not speeding. She testified that traffic was light.

Plaintiff's decedent's Avalanche at some point crossed from the lanes of eastbound Jefferson, over the center turn lane, over the third westbound lane and into the middle westbound lane of Jefferson. There was no evidence that Weaver applied the brakes or took any evasive maneuvers before the collision. The driver's side left-front-corner of the Avalanche collided with the bus at a very shallow angle, ten percent, and overlapped by one to two feet. That is, when the vehicles collided, they were almost parallel to each other.

After colliding with the Avalanche, the bus continued westbound, left the roadway, struck a steel pole and several parked cars, and came to rest after hitting an apartment building. Passenger Logan died of injuries, most likely from the impact of the bus striking the apartment building. The surviving bus passenger, Patterson, who dove down to the floor after hearing the bus and Avalanche collide, survived. Patterson phoned for help; the police and EMS arrived, and the jaws of life were used to extract Weaver from the bus. Plaintiff's decedent Harris was pronounced dead at the scene.

Weaver testified that she believed she lost consciousness until the bus was motionless. That Weaver lost consciousness is supported by Patterson's testimony that after the bus came to a standstill, she called out to Weaver and the other passenger for about ten minutes before she heard Weaver start screaming for help. Weaver also testified that she was hospitalized for four days and has had memory problems since the accident.

Plaintiff's complaints alleged that SMART was vicariously liable for Weaver's negligent acts, which included driving the bus in a careless, negligent, or reckless manner, in violation of MCL 257.626 and 257.626b; driving too fast for conditions and/or in violation of the posted

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[1] Weaver testified she has been a SMART bus driver since mid-1998. On the morning of the accident, she arrived at work thirty minutes before beginning her route to do a check on the bus. She remembers there being nothing wrong with the bus, starting her route and picking up three passengers. Two were on the bus when the accident occurred, the third had disembarked.

[2] Weaver testified that it was misting rain at the time of the accident, while Patterson, the surviving bus passenger, testified the rain had stopped by the time she got on the bus, which arrived five minutes later than its scheduled time at Patterson's bus stop.

speed limit, in violation of MCL 257.626; and failing to keep a proper lookout, in violation of MCL 257.627.

Defendants moved for summary disposition, asserting, inter alia, that no genuine issue of fact existed that plaintiff's decedent was not more than fifty percent negligent, thus precluding plaintiff from recovering damages as a matter of law. The circuit court agreed and granted defendants summary disposition, concluding that Weaver did not have enough time to react to avert colliding with Harris.

This Court reviews the circuit court's grant of summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In considering a motion under MCR 2.116(C)(10), the court considers affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

The violation of a duty imposed by a statute creates a rebuttable presumption of negligence in Michigan. *Zeni v Anderson*, 397 Mich 117, 129; 243 NW2d 270 (1976), *Johnson v Bobbie's Party Store*, 189 Mich App 652, 661; 473 NW2d 796 (1991). There may be more than one proximate cause of an accident, and it is not essential to recovery that the defendant's negligence be the sole proximate cause of an accident. *Orzel v Scott Drug Co*, 449 Mich 550, 556-557; 537 NW2d 208 (1995).

MCL 500.3135(2)(b) prohibits the recovery of noneconomic damages by a party who was more than fifty percent at fault:

> (2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:
>
> * * *
>
> (b) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.

The comparative negligence bar of MCL 500.3135(2)(b) applies only to "action[s] for damages pursuant to subsection (1)," which addresses noneconomic damages only. Comparative negligence is usually a question for the fact-finder. *Poch v Anderson*, 229 Mich App 40, 51; 580 NW2d 456 (1998). However, comparative negligence may be decided on a motion for summary disposition where "no reasonable juror could find that defendant was more at fault than the decedent in the accident" as required by MCL 500.3135(2)(b). *Huggins v Scripter*, 469 Mich 898; 669 NW2d 813 (2003). When reasonable minds can not differ regarding whether one party was substantially more at fault than the other, summary disposition is appropriate. *Id.*

Plaintiff conceded that plaintiff's decedent was negligent; what remains disputed is whether a reasonable fact-finder could conclude that Andrea Harris was not more than fifty

percent negligent. We conclude that the circuit court correctly answered the question in the negative.

Plaintiff's experts opined that given that the angle of impact was so shallow (ten percent), and that the vehicles overlapped by one or two feet only, Harris could not have swerved suddenly into the bus. They opined that Harris drifted from the eastbound lanes of Jefferson and crossed the center lane into the westbound lanes over a distance of some 100', and that Weaver thus had ample opportunity to observe the Avalanche. According to the experts, had Weaver swerved just one foot, the head-on collision would have been averted. The Avalanche's black box established that Harris accelerated during the five seconds before the accident from 24 m.p.h. to 38 m.p.h. Plaintiff's experts testified that Weaver had time to avert the head-on collision, had she been attentive to the roadway.

Weaver testified that nothing was obstructing her view of the roadway, and that she has no recollection of seeing the Avalanche at all, except perhaps a set of headlights pointing at her from the turn lane immediately before she and the Avalanche collided.

Based on this testimony, reasonable jurors could conclude that Weaver was herself negligent in failing to see Harris' vehicle and in failing to take evasive action, and the circuit court erred to the extent it concluded otherwise. Nevertheless, we must agree with the circuit court's ultimate conclusion that reasonable minds could not differ regarding whether Weaver was more negligent than Harris. Harris drifted across multiple lanes of Jefferson Avenue gradually: she crossed from the lanes of eastbound Jefferson, over the center turn lane, over the third westbound lane and into the middle westbound lane of Jefferson. No reasonable juror could conclude that Weaver should have been on alert that there was danger of a collision until Harris had entered the oncoming traffic lanes, i.e., until after Harris had already drifted into and beyond the center turn lane, into oncoming traffic. Harris did not make a sudden swerve into the oncoming lanes. Up until that point, Weaver could properly have assumed that Harris was simply entering the center turn lane and preparing to turn into an establishment. Under these circumstances, reasonable minds could not differ that although Weaver might have been negligent in failing to appreciate that a collision was imminent and take evasive action, Harris was more than fifty percent at fault in crossing into oncoming traffic and driving into the bus.

Plaintiff also asserts that the circuit court improperly relied on, or considered precedential, another circuit court decision that defendants raised below. We note that although the fifty-one page transcript of the hearing on defendants' motion reflects that defendants did summarize the case, there is no indication whatever that the ruling appealed here was in any way influenced by the other circuit court decision, or that the court considered it precedential.

In light of our disposition, we need not reach the governmental immunity issues addressed by the concurrence.[3]

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[3] We note, however, that although defendant Weaver argued governmental immunity in her motion for summary disposition and in her appellate brief, defendant SMART did not argue
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governmental immunity in its motion for summary disposition nor does it on appeal. Thus, SMART did not preserve the governmental immunity issue addressed by the concurrence. Further, we disagree with the substantive analysis of the issue. In concluding that the circuit court's dismissal of SMART was appropriate on the basis of governmental immunity, the concurrence states that although there was physical contact between the two vehicles, Harris' death did not "result from" the negligent operation of the bus, because the operation of the bus did not compel Harris to cross the center line. In reaching this conclusion, the concurrence relies on cases including *Robinson v Detroit*, 462 Mich 439, 456; 613 NW2d 307 (2000), and *Curtis v Flint*, 253 Mich App 555, 561-562; 655 NW2d 791 (2002).

MCL 691.1405 provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner. . .

Robinson, supra, and *Curtis, supra,* found that there was no statutory liability where the governmental vehicle did not come into physical contact with the plaintiff or the plaintiff's vehicle and did not force it into contact with another vehicle or object. *Robinson, supra,* involved a police chase during which injuries were sustained. The *Robinson* Court held that the statutory language "resulting from the negligent operation . . . of a motor vehicle", MCL 691.1405, required that the police vehicle hit the fleeing vehicle or otherwise physically force it off the road or into another vehicle or object. 462 Mich at 456-457.

> The motor vehicle exception requires that a plaintiff's injuries result from the operation of a government vehicle. MCL 691.1405; MSA 3.996(105). Because there is no case law that has previously examined the phrase "resulting from" we turn to the dictionary. The *American Heritage Dictionary, Second College Ed,* p 1054, defines "result" as: "To occur or exist as a consequence of a particular cause[;] To end in a particular way[;] The consequence of a particular action, operation or course; outcome." Given the fact that the motor vehicle exception must be narrowly construed, we conclude that plaintiffs cannot satisfy the "resulting from" language of the statute where the pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object. [*Robinson, supra,* 462 Mich at 456-457.]

In *Curtis, supra,* this Court affirmed the circuit court's grant of summary disposition to the defendant City of Flint because there was no evidence that the emergency vehicle at issue hit the plaintiff's vehicle or physically forced it off the road or into another vehicle or object. *Id.* at 561-562.

No case has held that the "resulting from" language is not satisfied in a situation where there was physical contact between the plaintiff's vehicle and the government vehicle.

(continued…)

We affirm the circuit court's grant of summary disposition to defendants.

/s/ Helene N. White
/s/ Alton T. Davis

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Nor has any case required that the operation of the governmental vehicle be the cause of the plaintiff's own contributing negligence.

We also note that in the instant case, because both vehicles were moving, each vehicle hit the other. The terms "hitter" and "hittee" advanced in the concurring opinion are allocated to the drivers based on which was the "offending" vehicle. In our view, such an evaluation goes to the separate issue of fault.